

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WAPATO HERITAGE, LLC, a  
Washington Limited Liability  
Company; KENNETH EVANS; JOHN  
WAYNE JONES; and JAMIE JONES,  
individual residents of  
Washington State,

Plaintiffs,

v.

SANDRA D. EVANS, an  
individual, not a resident of  
Washington State; and DAN  
GARGAN, a citizen of Arizona,

Defendants.

NO. CV-07-0314-EFS

**ORDER GRANTING AND DENYING IN  
PART DISCOVERY MOTIONS AND  
GRANTING MS. WYNNE'S MOTION TO  
WITHDRAW**

A hearing occurred in the above-captioned matter on February 25, 2009. Plaintiffs Wapato Heritage, LLC, Kenneth Evans, John Wayne Evans, and Jamie Jones were presented by Bruce Johnston and Michael Arch. Defendant Dan Gargan was represented by Scott Henrie. Defendant Sandra Evans was represented by Geana Van Dessel and Les Weatherhead. Non-party Mary Wynne was present and represented by Donald Curran. Before the Court were Plaintiffs' Motion for Deposit of Trust Funds, to Compel Discovery, Contempt, Supplementation of Initial Disclosures and Related Relief ([Ct. Rec. 172](#)); Defendant Evans' Motion for Protective Order ([Ct. Rec. 178](#)); Mary Wynne's Motion to Quash Subpoena Commanding the

1 Appearance for Deposition of Mary T. Wynne Pursuant to Fed. R. Civ. P.  
2 45 ([Ct. Rec. 182](#)); Ms. Buckholtz's Motion for Protective Order of Non  
3 Party Witness on Expedited Hearing ([Ct. Rec. 206](#)); and Mary Wynne's  
4 Motion to Withdraw ([Ct. Rec. 214](#)). After reviewing the submitted  
5 material and relevant authority and hearing oral argument, the Court is  
6 fully informed. This Order supplements and memorializes the Court's oral  
7 rulings.

8 **A. Ms. Wynne's Motion to Withdraw**

9 Ms. Wynne seeks permission to withdraw as counsel for Ms. Evans.  
10 Because Ms. Evans is represented by Mr. Weatherhead and Ms. Van Dessel  
11 and agrees with the withdrawal request, the Court finds good cause to  
12 grant Ms. Wynne leave to withdraw as counsel of record for Ms. Evans.

13 **B. Ms. Buckholtz's Motion for Protective Order of Non-Party Witness on**  
14 **Expedited Hearing**

15 Shelley Buckholtz, an attorney with Mikkelsen, Broz, Wells and  
16 Fryer, PLLC, seeks a protective order 1) rescheduling her March 2, 2009  
17 deposition set by Defendant Evans to March 19, 2009, and 2) limiting the  
18 deposition to less than 3.5 hours. Defendant Evans agrees to reset the  
19 deposition to March 19, 2009 - so long as the Court agrees to extend the  
20 current March 6, 2009 discovery deadline. Defendant Evans, however, asks  
21 the Court not to limit the deposition to a specific time length.

22 The Court finds continuing the March 2, 2009 deposition to March 19,  
23 2009, is appropriate given Ms. Buckholtz's involvement in a four-week  
24 bench trial until March 17, 2009. The Court denies Ms. Buckholtz's  
25 request to limit the deposition to 3.5 hours; however, the Court finds  
26

1 a four-hour limitation appropriate. Accordingly, Ms. Buckholtz' motion  
2 is granted and denied in part.

3 **C. Plaintiffs' Motion for Deposit of Trust Funds, to Compel Discovery,**  
4 **Contempt, Supplementation of Initial Disclosures and Related Relief**

5 As the motion's title evinces, Plaintiffs seek a variety of relief  
6 through this motion. Defendants Gargan and Evans largely oppose the  
7 motion. For the reasons given below, the Court grants and denies in part  
8 Plaintiffs' motion.

9 1. Deposit of Monies into Court Registry

10 Plaintiffs ask the Court to order Defendants to deposit money  
11 representing 35% of the MA-10 distributions thus far received by  
12 Defendant Evans into the Court's registry. The Court concludes that  
13 Plaintiffs fails to establish any cognizable basis for doing so in this  
14 breach of settlement agreement case. Accordingly, this request is  
15 denied.

16 2. Bank Account Records

17 Plaintiffs ask the Court to order Defendants Evans and Gargan to  
18 provide Defendant Evans' bank account records for the time period from  
19 November 11, 2005, to date. Defendants contend this request is overbroad  
20 because it includes Defendant Evans' personal financial documents.

21 Federal Rule of Civil Procedure 26(b)(1) states:

22 Unless otherwise limited by court order, the scope of discovery  
23 is as follows: Parties may obtain discovery regarding any  
24 nonprivileged matter that is relevant to any party's claim or  
25 defense—including the existence, description, nature, custody,  
26 condition, and location of any documents or other tangible  
things and the identity and location of persons who know of any  
discoverable matter. For good cause, the court may order  
discovery of any matter relevant to the subject matter involved  
in the action. Relevant information need not be admissible at  
the trial if the discovery appears reasonably calculated to

1 lead to the discovery of admissible evidence. All discovery  
2 is subject to the limitations imposed by Rule 26(b) (2) (C).

3 Rule 26(b) (1) is interpreted broadly and is premised on the principle  
4 that "[m]utual knowledge of all the relevant facts gathered by both  
5 parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S.  
6 495, 507 (1947); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351  
7 (1978). It is the requesting party's burden to establish that the  
8 discovery is relevant.

9 The Court finds that financial records a) related to the  
10 disbursement and transfer of MA-10 proceeds ("MA-10 money flow") and b)  
11 reflecting compensation paid to Defendant Gargan and Ms. Wynne for  
12 providing services to Defendant Evans in connection with the Settlement  
13 and Release Agreement, MA-10 proceeds, or First Phoenix International are  
14 relevant and discoverable. Yet, Defendant Evans may redact personal  
15 information, i.e., information that is not related to MA-10 proceeds or  
16 compensation - in any form - to Defendant Gargan or Mary Wynne.

17 Because Defendant Gargan has served as Defendant Evans' financial  
18 advisor and has online access to her financial accounts, he has the  
19 initial responsibility for obtaining relevant records within two (2)  
20 weeks. See *Bank of New York v. Meridien BIAO Bank Tanzania Ltd*, 171  
21 F.R.D. 135, 147 (S.D.N.Y. 1997); *Mattie T. v. Johnston*, 74 F.R.D. 498,  
22 502 (N.D. Miss. 1976) (holding that a subpoena may be served on the  
23 individual who has possession or access to the documents rather than the  
24 individual who owns the documents); *Couch v. United States*, 409 U.S. 322  
25 (1973). Defendant Gargan is to share these records with Defendant Evans,  
26 who must then supplement these records with any additional relevant  
financial records within two (2) weeks of this Order. During this

1 process, Defendants are to work together to identify the personal  
2 information appropriate for redaction. If there is a dispute, Defendants  
3 shall either select disclosure or ask the Court for guidance. Two (2)  
4 additional weeks are allowed to complete the redaction process.  
5 Accordingly, within six (6) weeks of this Order, Plaintiffs are to be  
6 provided appropriately-redacted financial records 1) related to the  
7 disbursement and transfer of MA-10 proceeds and 2) reflecting  
8 compensation - in any form - paid to Defendant Gargan and Ms. Wynne by  
9 Defendant Evans in connection with the Settlement and Release Agreement,  
10 MA-10 proceeds, or First Phoenix International.

11 Defendants are reminded of their obligation under Federal Rule of  
12 Civil Procedure 26(e) to timely supplement initial disclosures. The  
13 Court strictly enforces Rule 26 obligations.

14 3. Ms. Wynne's Disclosure Responsibilities

15 Plaintiffs ask the Court to order Ms. Wynne to produce all of the  
16 documents sought by the subpoena duces tecum. As set forth below in  
17 connection with Ms. Wynne's protective motion, the Court grants and  
18 denies in part this request. In short, within three (3) weeks of  
19 Defendants' above-described disclosure of appropriately-redacted  
20 financial documents, Ms. Wynne must produce not-previously-disclosed  
21 relevant documents. If Ms. Wynne withholds a document or communication  
22 on the basis of a privilege or protection, she abide by Federal Rule of  
23 Civil Procedure 26(b) (5).

24 4. Sanctions

25 Plaintiffs ask the Court to impose sanctions on Defendants Gargan  
26 and Evans. The Court declines to do so at this time. However,

1 Plaintiffs are free to renew their request following the close of  
2 discovery.

3 5. Discovery Master

4 Plaintiffs ask the Court to appoint a discovery master under Rule  
5 53, with the costs to be assessed against Defendants Gargan and Evans or  
6 their respective counsel. The Court declines to appoint a discovery  
7 master, finding it more efficient and beneficial for the Court and  
8 parties if it presides over discovery dispute issues.

9 6. Summary

10 Plaintiffs' motion is granted and denied in part. The Court grants  
11 Plaintiffs' motion in part by requiring Defendants to produce  
12 appropriately-redacted financial records within six weeks of this Order.  
13 Two (2) weeks following this disclosure, Ms. Wynne is to produce any  
14 supplemental financial records in her possession. Plaintiffs' motion is  
15 denied in part because Defendants need not deposit any money into the  
16 Court's registry; the Court will not impose sanctions at this time; and  
17 the Court will not appoint a discovery master.

18 **D. Defendant Evans' Motion for Protective Order**

19 Defendant Evans asks the Court to prevent disclosure of, and  
20 testimony on, documents requested by Plaintiffs in categories 2, 4, 5,  
21 5a, and 7 of the subpoena duces tecum issued to Ms. Wynne on the grounds  
22 that the documents are 1) irrelevant; 2) protected by the attorney-client  
23 doctrine, work product privilege, or a personal privacy interest; and 3)  
24 unduly burdensome to produce. In the alternative, Defendant Evans asks  
25 the Court to limit the scope of production to attorneys. Plaintiffs  
26 oppose the motion, contending that the requested documents are relevant,

1 and clarify that Plaintiffs are seeking each document from only one  
2 source - they do not care if it is produced by Defendant Gargan,  
3 Defendant Evans, or Ms. Wynne. The Court recognizes that the subpoena  
4 duces tecum was issued to Ms. Wynne; however, Plaintiffs seek this  
5 information from Defendants as well. Accordingly, the Court addresses  
6 below what information *Defendants* shall disclose.<sup>1</sup> For the reasons given  
7 below, the Court orders Defendants to provide many of the documents and  
8 communications requested by Plaintiffs.

9 As the Court noted above, Rule 26(b)(1) requires parties to disclose  
10 relevant matter. There are, however, limits imposed on this broad  
11 discovery right. Rule 26(b)(2)(C) limits discovery if it is unreasonably  
12 cumulative or duplicative; is obtainable from another source that is more  
13 convenient, less burdensome, or less expensive; if there had been ample  
14 opportunity to obtain information by discovery; or the burden outweighs  
15 the likely benefit. The Court applies these principles to each of the  
16 challenged subpoena duces tecum subsections.<sup>2</sup>

- 17 1. Subsection 2: "for the same period of time [8/1/05 to present],  
18 communications (including electronic documents of any kind or  
19 nature whatever) to and from non-federal government employee  
20 persons or entity (including without limitation Mary Person,  
21 Shelley Buckholtz, Dan Gargan, Wells Fargo Bank (any office in  
22 the United States), any other bank (anywhere in the world,  
23 First Phoenix International, LLC, any non-bank financial  
24 institution, including without limitation brokers, money market  
25 funds, hedge funds, investment companies, real estate brokers,  
26 developers or companies, any retired former government  
employee, and Debbie Rosenbaum) which in any manner whatever,

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24 <sup>1</sup> In the following section, the Court discusses Ms. Wynne's  
25 disclosure responsibilities.

26 <sup>2</sup> Because Defendant Evans did not challenge subsections 1, 3, or 6;  
Defendant Evans shall produce the requested documents and communications.

1           however attenuated, relate to or pertain to Sandra Evans,  
2           including without limitation to her Assignment of 35%, or any  
3           other amount, of the MA10 Lease proceeds pursuant to any  
4           Settlement Agreement between Ms. Evans and Plaintiffs (among  
5           others) or to any other aspect of the said Settlement  
6           Agreement, or to any business venture which to your knowledge  
7           involved Sandra Evans, her funds, or any contemplated business  
8           venture, whether or not coming to fruition, regarding which the  
9           involvement, financially or otherwise, of Sandra Evans was  
10          mentioned or discussed."

11          The Court finds that this request seeks relevant information;  
12          however, it is also overbroad. The Court modifies the request as  
13          follows:

14          Defendants shall disclose any communications (either written,  
15          oral, or electronic) from August 1, 2005, to the present, which  
16          relate to the Settlement and Release Agreement and/or MA-10  
17          proceeds involving Defendant Evans, Defendant Gargan, and/or  
18          Ms. Wynne. In addition, Defendants shall disclose any  
19          communications (either written, oral, or electronic) from  
20          August 1, 2005, to the present, which relate to First Phoenix  
21          International or any other venture in which Defendant Evans is  
22          involved with either Defendant Gargan or Ms. Wynne.

23          This modified disclosure request is not unduly burdensome. Defendants<sup>3</sup>  
24          shall disclose these communications within four (4) weeks.

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25          <sup>3</sup> When the Court refers to Defendants' duties to disclose in this  
26          motion, the Court is recognizing that only one (1) Defendant need produce  
a particular document or communication; duplicative disclosures should  
not be made. Defendants are to work together to ensure that disclosures  
are not duplicative.

1 If information is withheld on the grounds that it is privileged or  
2 protected, the party must comply with Rule 26(b)(5)'s requirements.  
3 Based on the current record, the Court understands that Ms. Wynne was not  
4 Defendant Evans' attorney from sometime in 2006 until Ms. Wynne's  
5 appearance in this action on September 30, 2008 ([Ct. Rec. 158](#)).

6 2. Subsection 4: "For the same period of time [8/1/05 to the  
7 present], Articles of Incorporation, Certificate of Formation,  
8 Bylaws, Minutes, Resolutions, loan documents, reports, business  
9 plans, investment suggestions or advice, whether formal or  
10 informal, of any kind or nature whatever, which in any manner  
11 whatever, however attenuated, relate or pertain to First  
Phoenix International, a South Dakota business entity,  
including any such documents which relate to the pre-formation  
activities or events relating to the entity ultimately formed  
as First Phoenix International, or to any entity having a  
similar name, currently or in the past."

12 Again, the Court finds that this request seeks relevant information;  
13 but it is overbroad. The Court modifies this request as follows:

14 Defendants shall disclose First Phoenix International's  
15 articles of incorporation, certificate of formation, bylaws,  
16 minutes, resolutions, and business plans from August 1, 2005,  
17 to the present.

18 Defendants shall disclose this information within four (4) weeks.

19 3. Subsection 5: "Any and all disclosure, waiver or other  
20 documents, which in any manner relate or pertain to, or  
21 mention, any actual or potential conflict of interest between  
your interests and the interests of Sandra D. Evans."

22 By limiting this request to Washington Rule of Professional Conduct  
23 1.8 information as clarified by Plaintiffs in their response, the Court  
24 finds this request seeks relevant information. Subsection 5 as clarified  
25 must be complied with within four (4) weeks. If Defendant Evans claims  
26 a privilege, she must comply with Rule 26(b)(5).

1       4.    Subsection 5a: "All monthly or other periodic statement of  
2       account, checks and/or cancelled checks or other account  
3       transactional documents or statements of any kind or nature,  
4       whether formal or informal, which in any manner whatever,  
5       relate or pertain to Sandra Evans, or any funds in which Sandra  
6       Evans had, or may have had, an interest, whether direct or  
7       indirect, at any financial institution, government entity,  
8       private entity, broker, broker dealer, investment company, of  
9       private borrower, or the like for the period 8/1/2005."

10       The Court finds Subsection 5a requests both relevant and irrelevant  
11       information. This request is limited to the following, which must be  
12       produced within four (4) weeks of this Order:

13       All statements of account, checks and/or cancelled checks, and  
14       transactional documents relating to the Settlement and Release  
15       Agreement and MA-10 proceeds (deposits and transfers).

16       5.    Subsection 7: "For the same period of time [8/1/05 to the  
17       present], any and all documents which in any manner whatever,  
18       relate or pertain to, or record or summarize, any  
19       communications by or between you, Sandra Evans, Dan Gargan or  
20       any person acting for any of them on the one hand, and Wright  
21       Wapato, Inc. its officers agents attorneys or employees on the  
22       other hand."

23       Again, this subsection seeks both relevant and irrelevant  
24       information. The Court limits this request as follows:

25       Defendants are to disclose documents (written or electronic)  
26       and communications (written, oral, or electronic) that relate  
27       to the Settlement and Release Agreement or MA-10 proceeds,  
28       between August 1, 2005, to the present, by or between Defendant  
29       Evans, Defendant Gargan, or Ms. Wynne (or on their behalf) and  
30       Wright Wapato, Inc. (or on its behalf).

31       Defendants are to disclose this information within four (4) weeks. If  
32       Defendant Evans asserts a protection or privilege, she must comply with  
33       Rule 26(b) (5).

1       6.    Summary

2       As set forth above, the Court grants and denies in part Defendant  
3   Evans' motion for a protective order.

4   **E.    Mary Wynne's Motion to Quash Subpoena Commanding the Appearance for**  
5   **Deposition of Mary T. Wynne Pursuant to Fed. R. Civ. P. 45**

6       Ms. Wynne asks the Court to quash Plaintiffs' subpoena duces tecum  
7   pursuant to Rule 45 because the subpoena 1) failed to allow a reasonable  
8   time to comply, 2) subjects Ms. Wynne to an undue burden, 3) requires  
9   disclosure of privileged materials, and 4) requires Ms. Wynne - who is  
10   neither a party nor a party's officer - to travel more than 100 miles  
11   from where she resides, is employed, or regularly transacts business in  
12   person.

13       Plaintiffs failed to comply with Rule 45's technical requirements -  
14   both the geographic and monetary requirements. Plaintiffs shall reissue  
15   a subpoena in compliance with Rule 45. Accordingly, Ms. Wynne's motion  
16   is granted in part - the January 2009 subpoena is quashed.

17       In anticipation that Plaintiffs will request the same documents in  
18   the next subpoena duces tecum, Ms. Wynne asks the Court to limit the  
19   requested documents because irrelevant documents are sought and the  
20   request is unduly burdensome. Because the Court is limiting Ms. Wynne's  
21   disclosure responsibility to that of supplementing Defendants' and Ms.  
22   Buckholtz' disclosures with any relevant documents or communications that  
23   have not theretofore been disclosed, the subpoena duces tecum's  
24   challenged requests<sup>4</sup> are not unduly burdensome. Ms. Wynne is to disclose

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25  
26       <sup>4</sup> Defendant Evans only challenged subpoena duces tecum requests 2,  
4, 5, 5a, and 7. Therefore, the Court addressed above these fully-  
ORDER \* 11

1 the supplemental information three (3) weeks after Defendants' ordered  
2 disclosures. If Ms. Wynne withholds a document or communication on the  
3 grounds that it is privileged, she must be guided by Rule 26(b)(5).

4 **F. Conclusion**

5 For the reasons given above, **IT IS HEREBY ORDERED:**

6 1. Plaintiffs' Motion for Deposit of Trust Funds, to Compel  
7 Discovery, Contempt, Supplementation of Initial Disclosures and Related  
8 Relief ([Ct. Rec. 172](#)) is **GRANTED** (Defendants are to produce  
9 appropriately-redacted financial records within six (6) weeks of this  
10 Order) **AND DENIED** (no Court registry deposit; no sanctions; and no  
11 discovery master) **IN PART**.

12 2. Defendant Evans' Motion for Protective Order ([Ct. Rec. 178](#)) is  
13 **GRANTED AND DENIED IN PART**. Defendants are to produce the ordered  
14 documents and communications within four (4) weeks of this Order.

15 3. Mary Wynne's Motion to Quash Subpoena Commanding the Appearance  
16 for Deposition of Mary T. Wynne Pursuant to Fed. R. Civ. P. 45 ([Ct. Rec.](#)  
17 [182](#)) is **GRANTED AND DENIED IN PART**. The January 2009 subpoena duces  
18 tecum is quashed. However, Ms. Wynne is to produce the Court-ordered  
19 subsection 2, 4, 5, 5a, and 7 documents and communications - not  
20 previously-disclosed by Defendants - within three (3) weeks of  
21 Defendants' disclosures.

22  
23 \_\_\_\_\_  
24 briefed challenged subsections. Ms. Wynne also objected to subsections  
25 1, 3, and 6 in her Motion for Protective Order. ([Ct. Rec.227.](#)) The  
26 Court will consider Ms. Wynne's objections to subsections 1, 3, and 6,  
without oral argument, on March 16, 2009. (Ct. Rec. 236.)

**DATED** this 6<sup>th</sup> day of March 2009.

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